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IN THE

Supreme Court of the United States

No. 77-1673

October Term, 1978

WILLIAM F. HASENSTAB,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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William F. Hasenstab petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of conviction of the United States District Court for the Southern District of New York.

OPINION BELOW

The judgment of conviction of the United States District Court for the Southern District of New York is unreported.

The Court of Appeals affirmed the judgment of conviction in an opinion (see Appendix A) dated April 24, 1978.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on April 24, 1978. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the mailings and the use of interstate wire facilities were sufficiently closely related to Petitioner's actions to bring his conduct within the purview of 18 U.S.C. §§1341 and 1343.

2. Whether the evidence is sufficient to support a conviction under 18 U.S.C. §1343.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

18 U.S.C. §1341

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such

matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. §1343

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioner, William F. Hasenstab, was indicted and charged in three counts with mail fraud, wire fraud and conspiracy, in violation, respectively, of Title 18, United States Code, Sections 1341, 1343 and 371. He was convicted on August 26, 1977 after a five day trial and was sentenced on October 5, 1977 to six months imprisonment on Count One, two years probation on Count Two, and a fine of $7500 on Count Three.

Petitioner appealed from his conviction to the United States Court of Appeals for the Second Circuit which affirmed the conviction.

The charges herein stem from Petitioner accepting gratuities while acting in his capacity as supervisor in the purchasing department of Pan American World Airways, Inc. ("Pan Am"), from George Barney, the President of Tabulating Stock Forms, Inc. ("Tabforms"), a vendor of paper products. Petitioner was indicted as a result of an expanding F.B.I. investigation after the conviction of George Barney in an unrelated case of commercial bribery.

REASONS FOR ALLOWING THE WRIT

1. The Mail Fraud Question

Petitioner urges this Court to find the absence of sufficient nexus between the mailings and the illegality charged to bring his conduct within the purview of 18 U.S.C. §1341.

Petitioner was convicted of defrauding Pan Am of his honest and faithful services as its employee and over $45,000.

It was alleged that petitioner, in his capacity as supervisor in Pan Am's purchasing department, was responsible for referring certain business to Tab Forms; however, the record is devoid of proof that Pan Am suffered financially as a result. There was no testimony that the prices paid for the goods purchased were, in any way, affected by the payments to Petitioner, that had such payments not been made, the prices to Pan Am would have been any less or that the prices paid by Pan Am were not, in fact, the best prices available.

Routinely, during the transaction of business between Pan Am and Tab Forms, a business which, in and of itself, was never alleged, nor proved, to be tainted by fraud, mailings were transmitted. These mailings were intrinsically innocent, representing the normal method of transacting business in this field, and having nothing whatsoever to do with the fraud itself.

It is respectfully submitted that the essence of the fraud herein was the acceptance of gratuities by Petitioner and the failure to report such receipt to his employer. Thus, the fraud did not take root until after the transaction of business and after the normal and routine transmittal of mailings between Pan Am and Tab Forms. Under these facts, the mailings were not sufficiently, closely related to the dishonesty to bring Petitioner's conduct within the statute, *U.S. v. Tarnopol,* 561 F.2d, 466 (3d Cir. 1977).

The United States Court of Appeals for the Second Circuit stated in its opinion "the essence of the scheme to defraud Pan Am was the creation of a system under which Pan Am would buy forms and paper from (Tab Forms) that it normally would have purchased elsewhere and that carrying out the scheme foreseeably involved the use of the mails . . ." The Court of Appeals also stated, "in effect, (Petitioner) and Barney were setting up a new business between Pan Am and (Tab Forms) with the direct purpose of benefitting themselves to the detriment of Pan Am." Finally, in this connection, the Court of Appeals stated the mailings were "actually in furtherance of the scheme to 'earn' kickbacks by the betrayal of Pan Am."

Petitioner respectfully submits this interpretation of the fraud by the Court of Appeals is inconsistent with the facts. Further, the record fails to establish a nexus between the fraud and the mailings.

The prosecution merely inferred that the payments received by Tab Forms for the goods delivered to Pan Am served as a source or fund for the gratuities later paid to the Petitioner, that is but for the sales, intrinsically innocent in themselves, there would be no fraud. However, the record is absent any proof connecting these particular sales receipts with the later payment of gratuities. In effect, the government's case rests on a "but for" type argument, that is, but for the sales, intrinsically innocent in themselves, there would be no fraud.

This type of argument has been rejected by the Seventh and Third Circuits. See *U.S. v. Staszcuk,* 502 F.2d 875 (7th Cir. 1974) and *U.S. v. Tarnopol,* 561 F.2d, 466 (3rd Cir. 1977).

2. The Wire Fraud Question

Petitioner submits the evidence of the interstate use of wire facilities was insufficient to sustain his conviction under 18 U.S.C. §1343. Barney testified that he spoke by telephone from his office in New York with Sol Welger at Pan Am's computer facility in New Jersey several times a week, and on one occasion, called Petitioner, Hasenstab, in New York from New Jersey.

At the outset of this litigation, the government stated it was unable to specify each and every transaction between Pan Am and Tab Forms to be illegal or to identify which transactions were illegal. The government never established that any particular transaction was illegal. Most importantly, the record is devoid of any connection between the interstate telephone calls and any fraudulent transaction. Thus, the conviction for wire fraud cannot stand.

Of course, even if the interstate use of wire facilities were of a character similar to the use of the mails, the conviction on this count could not stand because of the absence of sufficient nexus as previously set forth regarding the mail fraud.

This case gives the Court the opportunity to resolve a conflict among the Circuits in the application of the phrase "for the purpose of executing such scheme" in the mail and wire fraud statutes. In addition, the case gives the Court an opportunity to review the expansion of Federal jurisdiction in commercial bribery cases under the guise of violations of the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 613—September Term, 1977.
(Argued January 23, 1978 Decided April 24, 1978.)
Docket No. 77-1442

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM F. HASENSTAB,

Appellant,

Before:

HAYS and GURFEIN, *Circuit Judges,*
and BRYAN, *District Judge.**

Appeal from judgment entered by the District Court for the Southern District of New York (Ward, D.J.) after a jury trial convicting appellant of mail and wire fraud.

The Court of Appeals held: (1) the evidence was sufficient to establish that appellant, a purchasing supervisor for an airline company, had used mail and wire communications in furtherance of a scheme to defraud his

* Honorable Frederick vanPelt Bryan, United States District Judge for the Southern District of New York, sitting by designation.

employer by accepting bribes from the president of one of the airline's suppliers; and (2) the District Court did not err in permitting the Government to elicit impeaching evidence on direct examination of appellant's co-conspirator.

Affirmed.

RICHARD FRIEDMAN, New York, N.Y. (Friedman, Friedman, Levy & Bottiglieri, P.C., New York, N.Y., of counsel), *for Appellant.*

T. BARRY KINGHAM, Assistant United States Attorney, Southern District of New York (Robert B. Fiske, Jr., United States Attorney, and Robert J. Jossen, Assistant United States Attorney, Southern District of New York, of counsel), *for Appellee.*

GURFEIN, *Circuit Judge:*

William Hasenstab appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on October 6, 1977, following a five-day jury trial before the Honorable Robert J. Ward, *United States District Judge.*

An indictment, filed on July 5, 1977, charged the defendant Hasenstab in three counts with mail fraud, wire fraud and conspiracy, in violation, respectively, of Title 18, United States Code, Sections 1341, 1343 and 371. The jury returned a verdict of guilty on all counts.[1]

The Government's proof at trial demonstrated that from 1968 through 1976 William Hasenstab, a purchasing supevisor for Pan American World Airways, Inc. ("Pan

1. On October 5, 1977 the District Court imposed a sentence of six months imprisonment on Count One, two years probation on Count Two, and a fine of $7500 on Count Three.

American"), received about $50,000 in secret cash kickbacks from his co-conspirator George Barney, who testified for the Government. Barney, the president of Tabulating Stock Forms, Inc., a company which supplied Pan American with printed business forms, paid Hasenstab the kickbacks in return for Hasenstab's efforts to see that Tabulating received favored treatment from Pan American. In furtherance of the kickback scheme, Barney submitted bills to and received payment from Pan American through the mail. Barney also made periodic telephone calls between New York and Pan American's computer center at Rockleigh, New Jersey.

Barney met Hasenstab in 1967 when the defendant was a buyer of business forms at Pan American. During the next three years, Barney sold forms to Pan American through Hasenstab and, in appreciation for the business he received, Barney paid Hasenstab approximately fifty to one hundred dollars, once or twice each month. Due to labor trouble in 1970, Barney was unable to take new orders from Pan American. When Barney resumed active business with Pan American in 1972, Hasenstab told Barney that he liked their payoff arrangement, expected it to continue, but would be satisfied to receive only what Barney thought Hasenstab's services were worth. Barney told Hasenstab he would pay him 5% of the total dollar sales by Tabulating Forms to Pan American.

Between 1973 and 1976 Pan American's purchases from Tabulating Forms rose from $68,648 to $498,659, annually. In return for this substantial business, Hasenstab received something on the order of $50,000 in cash, with payments made on a monthly basis. The kickbacks were delivered by Barney to Hasenstab at various places: the Pan Am Building in Manhattan, Hasenstab's office at JFK Airport, and the Hamilton House restaurant in Brooklyn. Following Barney's arrest by the FBI in late 1976 for different offenses, two of

Hasenstab's meetings wit Barney were recorded with Barney's consent.[2] At the first of the recorded meetings, on December 1, 1976, Barney paid Hasenstab $1,000 in cash at the Hamilton House in Brooklyn. Because $3,000 was due on the schedule of payments for that month, Hasenstab expressed dismay, but recognized that it was the first time that Barney was short. At the second recorded meeting on January 6, 1977, Barney said he could not pay because he had not received payment from Pan American on certain orders. Hasenstab again complained, adding that Barney was getting him used to a "life style."

In return for the secret kickbacks, Hasenstab also helped Barney to fix price levels and to rig bids without competition. This practice contrasted with the normal purchase of business forms at Pan American by competitive bidding. Usually, Walter O'Toole, the Purchasing Manager, would refer Pan American's requisitions for business forms to Nicholas DiNapoli, a senior buyer. DiNapoli would distribute the requisitions among the buyers, including himself. The assigned buyer would solicit price quotations and select the supplier. The completed paperwork would then be sent for approval to Hasenstab, the Purchasing Unit Supervisor, and the order would be made final. The business with Barney's company was handled differently, however. DiNapoli testified that for about 60% of orders placed with Barney's firm, Hasenstab himself informed DiNapoli what prices and which "competitors" to enter on the bid quotation sheets, with Barney's price invariably appearing as the lowest. DiNapoli did not know whether Hasenstab actually obtained quotations, but he followed Hasenstab's orders, assuming that Hasenstab, an experienced printed forms specialist, knew what he was doing. Moreover, as a

2. Tape recordings of the meetings were introduced in evidence and played for the jury.

"management" employee, Hasenstab was not permitted to fill out the bid sheets for orders. All such "productivity work" had to be done by union employees like DiNapoli. Hasenstab was thus able to make it appear as if it was DiNapoli who had actually obtained the bid quotations.

In addition to routine orders, Pan American also had several long-term contracts with suppliers of printed forms. One of these was for the computer paper which was used by Pan American's data processing facility at Rockleigh, New Jersey. For the supply of paper in 1975, this contract had been awarded to Moore Business Forms, one of the nation's largest suppliers. However, during 1975, Hasenstab arranged for Barney's company to supply about half the year's remaining requirements for such paper. That contract was awarded without any competitive bids. Shortly thereafter, Barney's company was favored with the *entire* contract for the next year, 1976, worth about $300,000, as an "extension" of the improperly obtained 1975 contract. All of these arrangements were made by Hasenstab at a time when he was receiving cash payments from Barney ranging between $1,000 and $2,000 a month.

Throughout the period 1968 to 1976, Pan American mailed payments, and Barney sent invoices, bills and confirmations of the rigged orders through the mail. In addition, Barney used the telephone between New York and Rockleigh, New Jersey to expedite his business with Pan American's computer center, and on occasion called Hasenstab in New York from Rockleigh in order to facilitate the placing of orders and payment of invoices.[3]

3. In an effort to help Barney disguise the kickbacks, Hasenstab at first suggested putting his own wife on Barney's payroll. He also gave Barney blank receipts from a restaurant near Hasenstab's office so that Barney could take false tax deductions for entertainment expenses for the money given to Hasenstab. To cover his own part in the scheme, Hasenstab filed false conflict of interest forms with Pan American. On those forms, Hasenstab falsely swore that he had not received any personal benefit apart from his salary for his work at Pan American, thus concealing from his employer the fact that he had received thousands of dollars from Barney on a regular basis.

Appellant's principal claim is that the evidence failed to establish that use of the mails and interstate telephones was sufficiently connected to his scheme to defraud to support a conviction under the mail and wire fraud statutes, 18 U.S.C. §§1341, 1343 and 2.[4] He does not dispute with any vigor that the scheme was fraudulent but says that there was no *federal* crime. He contends that the only mailings were between Pan American and Tabulating Forms and that these were routine in nature, of the sort that would have taken place if there had been no fraudulent scheme whatever. He asserts that "neither the checks . . . , the invoices, or purchase orders served any purpose in relation to the basis of the fraud claimed to be against Pan Am." The fraud, he submits, was his acceptance of kickbacks without the knowledge of Pam, *after* the mailings occurred.

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4. 18 U.S.C. §1341 provides in part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. §1343 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Under 18 U.S.C. §2, anyone who "abets, counsels, commands, induces or procures" the commission of a federal offense, or "willfully causes" such an offense to be committed is punishable as a principal.

Appellant misses the point that the essence of the scheme to defraud Pan Am was the creation of a system under which Pan American would buy forms and paper from Barney's company that it would normally have purchased elsewhere. Carrying out the scheme foreseeably involved use of the mails in the sending of invoices by Tabulating Forms to Pan Am, the return of payments by mail from Pan Am, and the consequent payment of the commercial bribe. In effect, appellant and Barney were setting up a new business between Pan Am and Tabulating Forms with the direct purpose of benefiting themselves to the detriment of Pan Am.

To sustain a conviction under the mail fraud statute, "It is enough that [the defendant] participated in the scheme and that it was foreseeable that the scheme would involve use of the mails." *United States v. Finkelstein,* 526 F.2d 517 527 (2d Cir. 1975), *cert. denied sub nom. Scardino v. United States,* 425 U.S. 960 (1976). We have since reaffirmed that rule in *United States v. Cyphers,* 556 F. 2d 630, 634 (2d Cir.), *cert. denied,* 431 U.S. 972 (1977). In this case, as we shall see, the mailings were, moreover, actually in furtherance of the scheme to "earn" the kickbacks by the betrayal of Pan Am.

Appellant relies upon *United States v Tarnopol,* 561 F.2d 466 (3d Cir. 1977), but that case is not in point. There, officers and managers of recording companies kept sales off the books and retained the cash to make illegal payments to disc jockeys and program directors of radio stations. The Government charged them with using mail and wire communications to impede the functions of the IRS and to defraud artists and publishers of their royalties. The only mailings relied upon by the Government were of packing slips listing the records shipped. The essence of the scheme was the failure to record the sales on the books. The packing slips were a routine part of ship-

ping records and had nothing to do with increasing or diminishing the number of records shipped. The mailings themselves were legitimate as well as routine. They were unrelated to the scheme to withhold some of the cash proceeds.

On the contrary, here the mailings were products of the fraud itself. Barney's sales to Pan Am were a direct, not incidental, result of the scheme.

Appellant's reliance on *United States v. Maze,* 414 U.S. 395 (1975) is also misplaced. There the Court held that the defendant's scheme to defraud a bank by using a stolen credit card ended when he used the card to pay motel bills. The mailings of invoices and payments between the motels and the bank which issued the credit card were not in furtherance of the scheme because, as the Court observed, the purpose of mailing the invoices was to adjust accounts between the various victims of Maze's frauds, and there was "no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss." 414 U.S. at 402. Here, the obtaining of money to generate the kickbacks for appellant—the essence of the scheme—required the use of the mails.[5]

The evidence of use of interstate telephones was also sufficient to sustain Hasenstab's conviction on Count Two. Barney testified that he spoke by telephone from his office in New York City with Sol Welger at the Rockleigh, New Jersey computer facility several times a week and, on one occasion, called Hasenstab in New York from New

5. Appellant also cites *United States v. Staszcuk,* 502 F.2d 875 (7th Cir. 1974), *modified on other grounds in banc,* 517 F.2d 53, *cert. denied,* 423 U.S. 837 (1975). There, in connection with the bribery of an alderman to change the zoning laws with respect to certain property, a committee of the City Council mailed form notices for a public hearing to adjacent owners. This was the only "mailing" charged. The mailings were obviously not in furtherance of the fraud, and the Seventh Circuit so held.

Jersey. The purpose of each of these interstate phone calls was to regulate and control the paper contract between Tabulating and Pan American. Thus, the telephone was used in furtherance of the fraud because it was necessary for Barney to insure the continued receipt of requisitions from the New Jersey facility under the long-term computer paper contract which was "negotiated" by Hasenstab. The taped luncheon conversations between Hasenstab and Barney reveal that Hasenstab knew this, and that he was getting payments on a percentage basis, depending upon the amount of paper delivered under the contract which had been obtained by fraud. Barney's use of the telephone facilitated that process.

Hasenstab contends further that it was plain error for Judge Ward to allow the Government to elicit on the direct examination of its principal witness, Barney, an admission that he was guilty of similar commercial bribery schemes with others. Appellant suggests that his own association with Barney, a "bad man," spilled over to him unfairly, leading the jury to believe that he should be judged by the company he kept.

This is an old argument. Nothing disturbs a defense lawyer more than, when, for example, he has a record of conviction in his file ready to use in cross-examination, the Government uses it first. Permitting the Government to use it first does not turn on the extent to which a party may impeach his own witness on credibility. It is bottomed, rather, on a different theory. If the prosecution failed to elicit the impeaching evidence in the first instance, the jury might improperly assume that the Government was intentionally hiding it. *See United States v. Rothman,* 463 F.2d 488, 490 (2d Cir.), *cert. denied,* 409 U.S. 956 (1972); *United States v. Del Purgatorio,* 411 F.2d 84, 87 (2d Cir. 1969). In any event, it is long settled that the Government may proceed in this way, and that when no request is made

for a cautionary instruction, such instruction need not be given. Here there was no request.

We have examined with care the attack on Judge Ward's charge and find nothing which merits discussion. We have examined the other claims of error and find them insubstantial.

The conviction is affirmed.